Supreme Court, U. S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-947

ATLANTIC MARINE, INC.,

Petitioner,

-vs-

JIG III CORPORATION, PURITAN MARINE INSURANCE CORP., MID-AMERICAS GENERAL & REINSURANCE COMPANY, JAMES I. GEORGE, JR., and JAMES I. GEORGE, III,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated September 15, 1975, (A. 1-13), reported at 519 F.2d 171, the judgment (A. 14, 15), entered

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[1]Petitioner was defendant and third party defendant in the trial court and appellant in the United States Court of Appeals for the Fifth Circuit.

on September 15, 1975, and the Order of the Fifth Circuit, denying Petition for Rehearing, dated October 20, 1975, (A. 16), here sought to be reviewed, are reproduced in the Appendix.

JURISDICTION

Under 28 U.S.C. §1254(1) civil cases in the United States Courts of Appeals may be reviewed in this Court by writ of certiorari upon the petition of any party.

Supreme Court Rule 19(b) sets up generally the character of reasons for granting certiorari to a Court of Appeals. Here the majority two to one decision applies general maritime law to a non-maritime contract, contrary to and in conflict with applicable Florida law, Sections 671.1-102, 672.2-314, 316, 607(3)(a), 714, 715, 719, Florida Statutes (Uniform Commercial Code). This Court should take jurisdiction because of such improper application of the law by the Court of Appeals. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

Under Supreme Court Rule 22.3 and 28 U.S.C. §2101(c), application for a writ of certiorari to bring a civil judgment or decree here for review shall be made within ninety days after the entry of such judgment or decree. In a case where a petition for rehearing is rejected, this ninety-day period begins to run from the date of the order denying the petition. *Bowman v. Loperena Marina*, 311 U.S. 262, 266 (1940).

The Fifth Circuit's opinion and judgment, which Petitioner asks be reviewed, were entered September 15, 1975. Petitioner's timely application below for rehearing en banc was denied by the Fifth Circuit's Order of October 20, 1975.

This Court's jurisdiction is accordingly invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 19(b).

QUESTION PRESENTED

Has the Fifth Circuit two man majority erroneusly applied general maritime *tort* law to a nonmaritime *contract* in conflict with applicable Florida law (Uniform Commercial Code)?

This Question is of vital import to all states where the Uniform Commercial Code is in effect. Here there were (a) a nonmaritime contract to build a vessel, (b) privity between equal contracting parties, (c) no personal injuries, and (d) the only damage was to the product (vessel) itself. Thus, contract rather than tort law applies.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES OR REGULATIONS CONCERNED

Uniform Commercial Code, Sections 671.102; 672.314, 316, 607(3)(a), 714, 715, 719, Florida Statutes, reproduced in the Appendix (A. 17-22).

STATEMENT OF THE CASE

This suit, brought in the United States District Court for the Southern District of Texas, involves the loss sustained when a shrimp boat sank due to an alleged defect in design. There were no personal injuries as a result of the incident and the only loss was that of the shrimp boat. The case was submitted to the jury on special interrogatories relating to strict liability in tort, omitting any warranty or contract inquiry. The jury found that when the vessel was delivered

to the purchaser it had a defect which was a proximate cause of the loss.

Prior to the case being called to trial, the manufacturer of the shrimp boat, Petitioner here, filed its motion for summary judgment based on the contract of sale and the representations of quality expressed therein. The motion was renewed during the course of the trial at the close of plaintiff's case, and in the manufacturer's motion for judgment *non obstante veredicto*. On each occasion the trial court denied the motion.

The Court of Appeals for the Fifth Circuit, by a two to one vote, which includes a vigorous dissent, affirmed the District Court. The majority opinion (Goldberg, C.J.) concedes[2] that "Florida was the state in which the shipbuilding contract was made and performed," and then erroneously applies general maritime, tort law,[3] while recognizing that contracts to build ships are not maritime contracts.[4] The dissent (Gee, C.J.) flatly declares that "the opinion of the majority confounds the laws of torts and contracts and imports this tangle into the general maritime law." The dissenting judge correctly stated that there is no tort-based product-liability cause of action based either on negligence or strict manufacturer liability when there is no privity, no personal injury, and the only loss suffered is damage to the defective product itself; and that to withdraw freedom of contract from the parties under these facts confounds the commercial law of Florida and all other states which have adopted the Uniform Commercial Code.

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[2]519 F.2d 177, A. 8

[3]519 F.2d 180, A. 10

[4]519 F.2d 177, A. 7

FACTS

Jig III Corporation (Jig III) is a business engaged in the shrimping industry in Brownsville, Texas. In the spring of 1969, representatives of Jig III, James I. George, Jr., his brother-in-law, and his son, James I. George, III, for whom the corporation is named, were interested in acquiring additional shrimp boats for their Brownsville operation. After visiting several shrimp boat manufacturers, the Jig III representatives inquired at the Atlantic Marine, Inc. (AMI) plant at Fort George Island, Florida. Over a period of time, they discussed their requirements with AMI personnel and, as a result of these conferences, decided to purchase three shrimp boats from AMI. Preceding the agreement to purchase, the parties discussed boat requirements, such as vessel capibilities, design, shaft assemblies, prices and delivery dates. The parties reached an agreement which was reflected in the contract for each shrimp boat to be manufactured and purchased. The shrimp boat which is the subject of this suit was named the PRINCESS KE-AH-SOM-PAH and bore hull No. 54. The contract of sale was executed on April 16, 1969. The president of AMI signed for the manufacturer, and James I. George, III, as owner and representative of Jig III, signed for himself and the corporation. Before the contract was executed, it was reviewed by James I. George, Jr. After he had read and understood the provisions of the instrument, James I. George, Jr., as an officer and director of Jig III, advised his son to sign the contract.

The PRINCESS KE-AH-SOM-PAH was delivered and accepted by Jig III in the summer of 1969. Over two years later, on August 28, 1971, the vessel sank, giving rise to this lawsuit.

Jig III sued its insurance carriers, Puritan Marine Insur-

ance Underwriters Corporation and Mid-Americas General and Reinsurance Company, for failure to pay for the loss of the vessel under the terms of the policy. The insurance carriers filed a third-party action against AMI. Subsequently, James I. George, Jr., et al, filed a direct action against AMI and the actions were later consolidated. Prior to the trial, Jig III and its insurance carriers entered into an agreed judgment and both pursued the third-party action against the manufacturer, along with the direct action brought by James I. George, Jr., et al.

In its motions for summary judgment, directed verdict and judgment n.o.v., AMI asserted provisions of the sale contract which limited its representations concerning quality. AMI continues to contend that the doctrine of strict liability in tort has no application to the facts of this case. The warranty provision of the contract is as follows:

"Article 7 - Warranty"

"AMI shall warrant its workmanship and materials for a period of six (6) months after date of delivery to the initial purchaser against defective workmanship and materials, subject to the succeeding provisions hereof. This warranty is limited to the repair or replacement of defective parts and material only, as AMI may elect at its plant or other facility, so designated by AMI, of such materials as shall appear to it upon inspection, to have been defective in materials and workmanship. AMI shall not be responsible for warranty on any other manufacturer's equipment, machinery or materials, other than the warranty provided by such manufacturers. No other warranty of any kind is made or implied by AMI, including any losses of time or resultant

damages sustained by the owner, and no recommendation of items by others shall imply or constitute any warranty with respect to those items."

The legal effect of these important limitations and disclaimers was never passed upon by the trial court, for it (and the Fifth Circuit) erroneously applied standards applicable only in tort. See footnote 5 at 519 F.2d 180, A. 10, Judge Gee laments, "These issues have never been decided and now never will be."

REASONS FOR GRANTING THE WRIT

The Commercial Law of Florida, not Maritime Law, applies

The law is clear that a contract to build a ship is not a maritime contract. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). The majority concedes that the contract is not a maritime contract and further concedes that "Florida was the state in which the shipbuilding contract was made and performed." Yet, the majority specifically declined to follow Florida law, taking a position flatly contrary to the rule established in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In his dissent, Judge Gee states[5] as follows:

> "The majority, rather than looking to the commercial law of the State of Florida, has chosen to look to general maritime, tort law. In so doing it holds that under the general maritime law a manufacturer/seller owes a purchaser with whom it is in a direct and elaborate contractual relationship regarding a product a free-floating duty not to produce a negligently-constructed or designed product."

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[5]519 F.2d 180, A. 10, 11

The commercial law of Florida, as embodied in the Uniform Commercial Code (U.C.C.), provides a cause of action for breach of warranty under Florida law if the vessel was not merchantable [§672.2-314, Florida Statutes], unless Atlantic Marine successfully disclaimed that implied warranty or unless Jig III failed to give notice of the defect [§672.2-316 and §672.2-607 (3) (a), Florida Statutes.] The damages available to Jig III are also provided for by the U.C.C. as intentionally and conscionably limited by agreement of the parties [§§672.2-714, 715, 719, Florida Statutes].

Under the doctrine of *Erie R. Co. v. Tompkins, supra,* state court decisions control in federal courts as to the construction of particular contracts or contractual provisions, the requirements of a cause of action, the determination of damages and availability and applicability of particular defenses. See 20 Am.Jur.2d *Courts* §207. Under *Erie v. Tompkins, supra*, the commercial law of Florida, as embodied in the U.C.C. (A. 17-22), is the applicable law to the case, and this Court should take jurisdiction because of the improper application by the Court of Appeals of that doctrine. *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198 (1956).

The Florida courts have not considered a case involving a claim based upon the negligent design and construction of a chattel where the buyer and seller thereof enjoyed relatively equally bargaining power and where the only damage was to the purchased article itself. In applying the U.C.C., however, Florida has committed itself to follow decisions of other jurisdictions which have adopted the U.C.C. To that effect, in *Mason v. Avdoyan,* 299 So.2d 603 (Fla., 4th D.C.A. 1974), with particular reference to the Uniform Commercial Code, the court stated at page 606 as follows:

> "In construing Uniform Laws, it is pertinent to review

> holdings in other jurisdictions where the particular act is in force in the interest of attempting to achieve a *uniform interpretation.* Valentine v. Hayes, 102 Fla. 157, 135 So. 538 (1931)." [Emphasis supplied.]

In fact, the U.C.C., as adopted by Florida, states in §671.1-102, Florida Statutes, as follows:

> "Underlying purposes and policies of this Code are: . . . (c) To make uniform the law among the various jurisdictions."

The Supreme Court of Florida has consistently held that the purpose of the Uniform Laws, including the Uniform Negotiable Instruments Law (repealed and replaced by the Uniform Commercial Code) as so specifically stated above "was intended to receive uniform interpretation and construction in all states where it prevailed," *Valentine v. Hayes,* 102 Fla. 157, 135 So. 538 (Fla., 1931), and "to produce uniformity in the country, as far as possible, in law," *Mutual Finance v. Martin,* 63 So.2d 649 (Fla., 1953). Florida thus follows the decisions of other states which have interpreted the Uniform Commercial Code.

What have other jurisdictions had to say about the U.C.C. and the doctrine of strict liability?

No strict liability in tort where only damage is to product itself

In *Hawkins Construction Co. v. Matthews Co., Inc.,* 209 N.W. 2d 643 (Neb., 1973), the Supreme Court of Nebraska said at page 653 as follows:

> "If the loss is merely economic, the Uniform Commercial Code has given the purchaser an ample recourse

under the particular provisions and requirements of the Code. Placed broadly, it is the law of sales, and not the law of torts which protects the buyer's interest in the benefit of his bargain."

The doctrine of strict liability in tort is stated in *Restatement (2d) of Torts*, §402a(1965). It is based entirely on notions of public policy to distribute equitably the risk of *personal injury* arising from defective products. In the case before the Court, however, there is no personal injury involved. The only loss was that of the shrimp boat in question and that was "economic loss."

Chief Justice Traynor has explained the relationship between the law of warranty and the doctrine of strict liability in the case of *Seely v. White Motor Co.*, 403 P.2d 145 (Cal., 1965), where he states at page 149 as follows:

"The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability and tort indicates that it was designed not to undermine the warranty provisions of the Sales Act or of the Uniform Commercial Code but, to govern the distinct problem of physical injuries.

"Final recognition that '[t]he remedies of injured consumers ought not to be made to depend upon the intricasies of the law of sales' [authorities omitted] caused this court to abandon the fiction of warranty in favor of strict liability in tort. . . .

"The fact that the warranty theory was not suited to the field of liability for personal injuries, however, does not mean that it has no function at all. . . .

"Although the rules of warranty frustrate rational compensation for physical injury, they function well in a

commercial setting. [Authorities omitted.] These rules determine the quality of the product the manufacturer promises and thereby determine the quality he must deliver. . . ."

As Chief Justice Traynor indicated, strict liability and breach of warranty are two separate doctrines with two different purposes. Strict liability was developed to compensate the consumer for external harm caused by defective products, but questions concerning the value of the defective product itself are best handled by the law of warranty or contract. Strict liability in tort has not done away with freedom of contract. Buyers and sellers still negotiate and determine among themselves what representations of quality and value the seller will make concerning the product itself.

In the case before the Court, the seller specifically disclaimed any responsibility for the quality of the product after a period of six months, and the buyer accepted that disclaimer when he signed the sales contract. The *Seely* decision is directed to the identical factual situation as is now before the Court.

The cases are clear, therefore, that tort liability does not extend to the situation in which a defective product causes only the loss of value of the product itself. See also, *Pioneer Hi-Bred International, Inc. v. Talley*, 493 S.W.2d 602 (Tex. Civ. App. - Amarillo, 1973); *Thermal Supply of Texas, Inc. v. Asel*, 468 S.W.2d 927 (Tex. Civ. App. - Austin, 1971); *Hagenbuch v. Snap-On Tools Corporation*, 339 F.Supp. 676, 680 (D.N.H., 1972); *Keystone Aeronautics Corporation v. R. J. Enstrom Corporation*, 364 F.Supp. 1063 (W.D. Pa., 1973). The courts in California, Nebraska, Texas, New Hampshire and Pennsylvania all say that the law of sales should govern this case. The Fifth Circuit now says, however, that the

concept involved here is "tortious breach of contract,"[6] described by Judge Gee as "the rich new legal lode discovered by the majority, which has lain largely unnoticed under the noses of courts for time immemorial." The U.C.C. no longer is uniform in this important area. Who will untangle the damage now done, not only to Atlantic Marine but to the Uniform Commercial Code, if not this Court?

In *Delta Airlines, Inc. v. Douglas Aircraft Co.*, 238 Cal. App.2d 95 47 Cal. Rptr. 518 (1965), Delta had purchased an airplane from Douglas. Two days after delivery, while a Delta crew was attempting to land the plane after a check flight, the nose wheel failed to function properly, causing the plane to veer off the runway with resulting damage to the aircraft. There were no personal injuries and the only damages sought were the costs to Delta of repair of the airplane. After finding that Douglas had successfully waived any warranties, the court reversed the trial court's judgment and held that Delta could not recover upon a finding of negligent manufacture. The court stated:

> "In short all that is here involved is the question of which of two equal bargainers should bear the risk of economic loss if the product sold proved to be defective. Under the contract before us, Delta (or its insurance carrier, if any) bears that risk in return for a purchase price acceptable to it; had the clause been removed, the risk would have fallen on Douglas, (or its insurance carrier, if any) but in return for an increased price deemed adequate by it to compensate for the risk assumed. We can see no reason why Delta,

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[6]519 F.2d 181-182, A.12

> having determined, as a matter of business judgment that the price fixed justified assuming the risk of loss, should now be allowed to shift the risk so assumed to Douglas, which had neither agreed to assume it nor been compensated for such assumption."

A mulcted Atlantic Marine

A holding that a purchaser of a defective product in an arm's-length transaction is entitled to a tort recovery for the loss of the value of the product itself, without regard to any contractual warranty provisions, would mean that commercial purchasers and sellers would no longer be free to negotiate warranty terms among themselves. Judge Gee, in his dissent, deals with that point. He states as follows at 519 F.2d 179, 181-182; A. 10, 12-13:

"If promises are made and broken, the code, modified by the contract, provides adequate remedy. There is no occasion for resort to the law of torts for a right or a remedy. Moreover, allowing the plaintiff here, Jig III, to prosecute its tort cause of action is highly unfair to the defendant, Atlantic Marine, for it allows Jig III simply to ignore all of Atlantic's attempted disclaimers of warranty and limitations of remedies, which disclaimers and limitations were a part of the bargain and are specifically allowed by the jurisdiction most concerned with the contract between these two parties (Florida). These issues have never been decided and now never will be. Yet surely the parties thought these clauses, here cavalierly brushed aside, meant *something*. It also dispenses Jig III from following those commercially reasonable practices, such as notice of breach demanded by the code. . . .

"The majority's contrary rule, which gives tort law pre-eminence, mangles the intricate mechanism of the U.C.C. and rewrites past contracts of maritime manufacturers such as Atlantic Marine entirely, changing the negotiated terms concerning the quality of the goods to be delivered. Quality, of course, directly affects price. Both quality and price should be negotiable items and the law of sales is the framework within which the negotiations should take place--and did take place here. . . .

"Fortunately the rich new legal lode discovered by the majority which has lain largely unnoticed under the noses for time immemorial--that of tortious breach of contract--will likely remain largely unworked. In the normal contract case it does not signify whether the promisor carelessly but fortuitously perform his promise or negligently fails to do so: the question is whether or not he performed at all. And the alien duties from the world of torts which the majority materializes on Jig's side of the scales in our case may, they say, be disclaimed by contract--and doubtless promptly will be by knowledgeable shipbuilders operating within our reach. And so we will return to the road which we should never have left, contract law, leaving as signs of our passage only a mulcted Atlantic Marine and a pitfall for the uninformed. I would reverse."

If Petitioner had sold a defective product which caused personal injury to anyone or caused damage to another's property, then it would be liable in tort. However, the law of products liability has not completely displaced the law of sales. When the only loss incurred by the purchaser is the loss of the value of the product itself, the responsibility for that loss is to be allocated to the law of sales. The Court of Appeals for the Fifth Circuit has misapplied that law, leaving not only "a mulcted Atlantic Marine," but a mulcted U.C.C. There is a crying need for this Court to intervene.

CONCLUSION

We suggest that certiorari should be granted to correct the erroneous application of maritime tort law to a non-maritime contract, in conflict with applicable Florida law, depriving Petitioner of its right and freedom to rely on the arm's length contract with Respondent in accordance with the commercial law of the State of Florida, the law which should have been applied to this case in accordance with the rule of *Erie v. Tompkins*, supra. *Uniform interpretation of the U.C.C. requires that this Court make it clear that tort law does not apply where there is privity, no personal injury, and the only loss suffered is damage to the product itself.* This conflict between general maritime law and general contract law (U.C.C.) affects the commercial law of every jurisdiction in the United States and should be resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition was furnished to the following counsel:

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JIG THE THIRD CORPORATION, Plaintiff-Appellee,

v.

PURITAN MARINE INSURANCE UNDERWRITERS CORPORATION et al., Defendants-Third-Party Plaintiffs-Appellees,

ATLANTIC MARINE, INC., Third-Party-Defendant-Appellant.

James I. GEORGE, Jr., et al., Plaintiffs-Appellees,

v.

ATLANTIC MARINE, INC., Defendants-Appellants.

JIG THE THIRD CORPORATION et al., Plaintiffs-Appellees,

v.

Y. E. HALL, INC., Defendant-Third-Party Plaintiff-Appellee,

ATLANTIC MARINE, INC., Third-Party-Defendant-Appellant.

No. 74-2709.

United States Court of Appeals, Fifth Circuit.

Sept. 15, 1975.

Purchaser-owner of shrimp boat brought action against shipbuilder-seller for loss of the shrimp boat which sank in the Gulf of Mexico. The United States District Court for the Southern District of Texas, Reynaldo G. Garza, Chief Judge, rendered judgment for the purchaser-owner and the shipbuilder-seller appealed. The Court of Appeals, Goldberg, Circuit Judge, held that the purchaser-owner had a maritime tort action rather than a contract action against the shipbuilder-seller; that the purchaser-owner was entitled to present its theory and evidence of negligent design and construction to the jury; and that the written warranty was not such a clear and unequivocal disclaimer of liability for negligence as to preclude recovery.

Affirmed.

Gee, Circuit Judge, dissented and filed opinion.

1. Courts ⇐406.5(9)

In reviewing the sufficiency of the evidence to support a jury verdict, Court of Appeals must view that evidence in the light most favorable to the prevailing party below.

2. Products Liability ⇐88

Whether manufacturer of shrimp boat negligently designed and constructed shaft assembly and whether the negligence was the proximate cause of the vessel's sinking were questions for the jury.

3. Admiralty ⇐18

When an oceangoing shrimp boat sinks in 15 fathoms of water in the Gulf of Mexico and the sinking is allegedly tortious, there is maritime locality plus a significant relationship to the traditional maritime activity and tort, if recognized by the law, is maritime in nature; this would be true even though the conduct complained of may have been negligent construction or defective design and may have occurred ashore.

4. Admiralty ⇐18

Although under certain circumstances a court applying general maritime law might look to the law of particular state when that state has strong contacts with the parties or other legiti-

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mate interests, the interests of admiralty overbalanced those which any state might have and admiralty jurisdiction existed where allegedly tortious act or omission that occurred during the shipbuilding process allegedly caused an oceangoing vessel to sink on the high seas.

5. Products Liability ⇐11

A manufacturer's negligent design or manufacture of a product gives rise to a cause of action in tort, even when the aggrieved buyer is the economic equal of the seller and when the only damage is to the purchased chattel itself.

6. Products Liability ⇐71

Purchaser of shrimp boat was entitled to bring action in tort against manufacturer for loss of shrimp boat allegedly as result of negligent design and construction of shaft assembly; purchaser was not limited to a contract remedy to be resolved solely within the bounds of the contractual relationship. U.C.C. § 2–314.

7. Products Liability ⇐11

Generally, parties of relatively equal bargaining power may contract for the sale of a chattel whereby the seller disclaims any liability for commercial damage to the product which may result from negligent design or manufacture thereof.

8. Products Liability ⇐11

Although a seller's disclaimer of negligence will be enforced where the contract specifically mentions "negligence," "tort" or cognates thereof, the courts will not enforce a disclaimer of negligent design and manufacture, even in a commercial context, unless the contractual language is clear and unequivocal.

9. Admiralty ⇐11

Generally, contracts to build ships are not considered to be maritime in nature.

10. Products Liability ⇐62

Where shipbuilder's six-month warranty was "against defective workmanship and materials" and no specific mention was made either of "negligence" or of "tort liability," the warranty was not clear and unequivocal in its warning that the purchaser thereby waived its common-law right to recover any damages to the shrimp boat which might result from shipbuilder's negligence and did not constitute such a disclaimer of liability for negligence as to preclude purchaser from recovery for loss of the shrimp boat as result of negligence of the shipbuilder in design and manufacture of shaft assembly.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, CLARK and GEE, Circuit Judges.

GOLDBERG, Circuit Judge:

On August 28, 1971, M/V PRINCESS KE AH SOM PAH, a shrimp boat, sank in 15 fathoms of water in the Gulf of Mexico south of Port Aransas, Texas. There was no loss of life or personal injury, but the vessel itself and its gear, including its engines, navigational equipment and rigging, were claimed by the sea. The owners of the PRINCESS, James I. George, Jr., James I. George, III and JIG III Corporation [referred to collectively hereafter as JIG III], sued the vessel's manufacturer, Atlantic Marine, Inc., advancing three theories of recovery: one in contract—breach of warranty—and two in tort—negligent design and construction and strict liability.[1] After a trial, the jury found that the sinking of the PRINCESS resulted from a defect in the design or construction of the boat.[2] The jury also found in answer to a special interrogatory that Atlantic Marine was negligent in the "design and/or manufacture of the vessel." Atlantic Marine appeals, contending that JIG III's remedy, if any, must be found within the four corners of the contract of sale. We believe, however, that nothing in that contract can be construed to exonerate Atlantic Marine of liability for its own negligent design or construction of the PRINCESS, and we affirm the jury's verdict on that basis.

I

[1, 2] At trial, JIG III endeavored to prove that Atlantic Marine had negligently designed and constructed the PRINCESS' shaft assembly, and that this negligence was the proximate cause of the vessel's untimely demise. Plaintiff's several expert witnesses testified that Atlantic Marine's utilization of a 4½-inch, cold-rolled steel shaft instead of the standard 4-inch, stainless steel shaft for its boats was very unsound, and that this design was not approved by the American Bureau of Shipbuilders. These witnesses also noted other defects in the shaft assembly. Finally, JIG III showed that three other Atlantic Marine-built shrimpboats of similar design had either sunk or suffered serious damage as a result of the same sort of malfunction as that which led to the loss of the PRINCESS. In sum, especially considering the fact that upon review of the sufficiency of the evidence to support a jury verdict, this Court must view that evidence in the light most favorable to the prevailing party below, *Boeing Co. v. Shipman*, 5 Cir. (*en banc*) 1969, 411 F.2d 365, 374, we believe that there was ample evidence to support the jury's finding of negligent design and construction by Atlantic Marine.

Atlantic Marine contends, however, that whatever the evidence may have been, it ought not to have been submitted to the jury, for in the particular circumstances of this case, JIG III must obtain recompense on a contract theory or not at all, so that there was properly no tort theory for the jury to consider. Atlantic Marine reasons that where, as here, the genesis of the relationship between two parties is contractual in nature, where the parties are of relatively equal bargaining power, and where the only loss complained of is the loss of the chattel which was the subject of the contract, the aggrieved buyer is limited to the remedies afforded by that document. This result is said to be the only proper one because the buyer and seller in such a situation clearly intended that all their future relations with respect to the chattel should be governed by the terms of the bargained for contract of sale, and because another result, that is, the availability of a tort action to the buyer,

1. A second suit, *JIG The Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, No. CA 72–B–121, was consolidated in the district court with JIG III's action against Atlantic Marine. A third case, *JIG The Third Corp. v. Y. E. Hall, Inc.*, No. CA 73–B–142, was apparently not consolidated but affected the judgment below. In each case, the defendants impleaded Atlantic Marine as a third-party defendant. Prior to trial, Puritan, JIG III's apparently insolvent insuror, entered into a consent decree with JIG III for the limit of its policy, $90,000. The district court's order accepting this settlement is not disturbed by our opinion.

2. The shaft assembly was defective in design or construction; the defect caused severe leakage which eventually sunk the PRINCESS.

would upset the finely-tuned economic calculations which underlay the making of the initial agreement.

[3, 4] We preface our discussion of this issue by pointing out that the law governing the existence of any tort-based cause of action here is the general maritime law. When an ocean-going shrimpboat sinks in 15 fathoms of water in the Gulf of Mexico and the sinking is allegedly tortious, there is maritime locality plus a significant relationship to traditional maritime activity, and the tort, if recognized by the law is maritime in nature. *See Executive Jet Aviation, Inc. v. City of Cleveland,* 1972, 409 U.S. 249, 268, 93 S.Ct. 493, 505, 34 L.Ed.2d 454, 467;[3] *In re Motor Ship Pacific Carrier,* 5 Cir. 1974, 489 F.2d 152, 154–55, *cert. denied sub nom., Union Camp Corp. v. Gypsum Carrier, Inc.,* 417 U.S. 931, 94 S.Ct. 2643, 41 L.Ed.2d 235; *Union Oil Co. v. Oppen,* 9 Cir. 1974, 501 F.2d 558, 560–63. This would be true even though the conduct complained of may have been negligent construction or defective design and may have occurred ashore. *See Watz v. Zapata Off-Shore Co.,* 5 Cir. 1970, 431 F.2d 100, 112–14; *Oppen v. Aetna Ins. Co.,* 9 Cir. 1973, 485 F.2d 252, 256. Of course, under certain circumstances and on familiar conflicts principles, a court applying the general maritime law might look to the law of a particular state when that state has strong contacts with the parties or other legitimate interests. This would be especially appropriate when the relationship of the allegedly tortious behavior to traditional maritime behavior is enough to confer admiralty jurisdiction but is, in the main, slight. *See Watz v. Zapata Off-Shore Co., supra.* When, however, as in this case, the allegedly tortious act or omission causes an oceangoing vessel to sink on the high seas and the act occurred during the shipbuilding process, the interests of admiralty overbalance those which any state might have.

[5] The basic difficulty with Atlantic Marine's contention that JIG III's grievance against it must be resolved solely within the bounds of their contractual relationship is that torts ordinarily are not concidered to constitute a part of any contractual relationship. On the contrary, the common assumption is that parties intend their contractual relations to be governed by the law of contract, and their tortious relations, if any, to be governed by the law of torts; this is true even if the tortfeasor is a seller, the victim the buyer, and the only loss is property damage to a chattel purchased by the buyer from the seller. As Dean Prosser remarks:

> There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, but also property damage to the defective chattel itself.

W. Prosser, The Law of Torts § 101 at 665–66 (4th ed. 1971). Numerous recent cases have demonstrated that a manufacturer's negligent design or manufacture of a product gives rise to a cause of action in tort, even where the aggrieved buyer is the economic equal of the seller

3. *Executive Jet,* of course, was more concerned with admiralty jurisdiction than with the question of what law was applicable. As we have noted, however:

> Choice of law questions raised in a maritime context have traditionally been analyzed in jurisdictional terms . . . because as a general rule "[o]nce admiralty jurisdiction is established, then all of the substantive rules and precepts peculiar to the law of the sea become applicable.

In re Dearborn Marine Service, Inc., 5 Cir. 1974, 499 F.2d 263, 277 n. 27, reh. denied, 5 Cir. 1975, 512 F.2d 1061.

and where the only damage is to the purchased chattel itself. *See, e. g., Sterner Aero AB v. Page Airmotive, Inc.,* 10 Cir. 1974, 499 F.2d 709; *Keystone Aeronautics Corp. v. R. J. Enstrom Corp.,* 3 Cir. 1974, 499 F.2d 146; *Continental Grain Co. v. Fegles Const. Co.,* 8 Cir. 1973, 480 F.2d 793; *Neville Chemical Co. v. Union Carbide Corp.,* 3 Cir. 1970, 422 F.2d 1205, cert. denied, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55.

Atlantic Marine suggests, however, that whatever the law may once have been, the Uniform Commercial Code's implied warranty of merchantability, U.C.C. § 2–314,[4] has subsumed the tort of negligent design and manufacture, thus turning a tort claim into a contractual one. We believe that this argument fundamentally misapprehends the distinction between tort and contract, for it assumes that the "former" tort of negligent design and manufacture was really nothing more than a sort of quasi-contractual warranty of non-negligent design and manufacture. While such a legal abstraction might well provide the missing link in products liability law, we have been unable to find any precedential traces of this creature, and we conclude that it has never existed in corporeal form. Dean Wade recently addressed this same problem and reached this result, reasoning that the complete absence of any U.C.C. provisions dealing specifically with negligence is "quite significant," for at the time of the Code's adoption, the law of products liability—including a seller's liability for negligent design and manufacture—was well-established, so that if the U.C.C. had been intended to supplant the law of negligence, its framers would certainly have said so. Dean Wade believes that the legislative history of the U.C.C. firmly supports his—and our—conclusions.[5] *See* Wade, Is Section 402A of the Second Restatement of Torts Preempted by the U.C.C. and Therefore Unconstitutional?, 42 Tenn.L.Rev. 123, 131–35 (1974).

[6] The admiralty courts have followed the general rule that a tort cause of action exists in a situation such as that presented by this case. *See Houston-New Orleans, Inc. v. Page Engineering Co.,* E.D.La.1972, 353 F.Supp. 890, 899; *Sears, Roebuck & Co. v. American President Lines, Ltd.,* N.D.Cal.1971, 345 F.Supp. 395, 402; *Taisho Fire & Marine v. Vessel Montana,* N.D.Cal.1971, 335 F.Supp. 1238, 1239; *Dudley v. Bayou Fabricators, Inc.,* S.D.Ala.1971, 330 F.Supp. 788, 791; *cf. Alcoa S. S. Co. v. Charles Ferran & Co.,* 5 Cir. 1967, 383

4. Section 2–314 provides:

> (1) Unless excluded or modified (Section 2–316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and . .
>
> (c) are fit for the ordinary purposes for which such goods are used . . . .
>
> (3) Unless excluded or modified (Section 2–316) other implied warranties may arise from course of dealing or usage of trade.

5. To Atlantic Marine's warning that the availability of a tort action to parties situated as JIG III here will turn every properly contractual breach of warranty case into a tort case, we can only reply that the state of the law is clearly opposed to its position, and observe that there is a great deal of difference between proving that a product does not work and that it has been negligently designed or manufactured. *See, e. g., Weakley v. Fischbach & Moore, Inc.,* 5 Cir. 1975, 515 F.2d 1260; *Ward v. Hobart Mfg. Co.,* 5 Cir. 1971, 450 F.2d 1176; *Raybond Electronics, Inc. v. Glen-Mar Door Mfg. Co.,* 1974, 22 Ariz.App. 409, 528 P.2d 160.

F.2d 46, 50, cert. denied, 1968, 393 U.S. 836, 89 S.Ct. 111, 21 L.Ed.2d 107; *see also Schaeffer v. Michigan-Ohio Navigation Co.*, 6 Cir. 1969, 416 F.2d 217, 221; *In re Alamo Transportation Co.*, S.D.Tex. 1970, 320 F.Supp. 631, 634. It follows that JIG III was entitled to present its theory and evidence of negligent design and construction to the jury.

II

Atlantic Marine also urges that even if JIG III has a tort claim against it, the terms of the shipbuilding contract itself prescribe a specific and exclusive remedy in the event of damage to the PRINCESS. Since the particular loss involved in this case does not fall within the ambit of the contractual remedy, Atlantic Marine reasons, the contract forecloses recovery on the tort claim. Article 7 of the contract provides:

Article 7—Warranty

[Atlantic Marine] shall warrant its workmanship and materials for a period of six (6) months after date of delivery to the initial purchaser against defective workmanship and materials, subject to the succeeding provisions hereof. This warranty is limited to the repair or replacement of defective parts and material only, . . . as shall appear to [Atlantic Marine] upon inspection, to have been defective in materials and workmanship. . . . No other warranty of any kind is made or implied by [Atlantic Marine], including any losses of time or resultant damages sustained by the owner, and no recommendation of items by others shall imply or constitute any warranty with respect to those items.

The PRINCESS was delivered to JIG III in the summer of 1969, and the boat was not lost until August, 1971, so it does not appear that JIG III could recover damages under the express terms of the warranty.[6] JIG III contends, however, that the terms of the warranty were an inadequate disclaimer of Atlantic Marine's liability for negligent design and construction, so that Atlantic Marine's contractual defense must fail.

[7, 8] The general rule is that parties of relatively equal bargaining power may contract for the sale of a chattel whereby the seller disclaims any liability for commercial damage to the product which may result from the negligent design or manufacture thereof. *See, e. g., Continental Grain Co. v. Fegles Construction Co., supra*, 480 F.2d at 793; *Neville Chemical Co. v. Union Carbide Corp., supra*, 422 F.2d at 1216; *Southwest Forest Industries, Inc. v. Westinghouse Electric Corp.*, 9 Cir. 1970, 422 F.2d 1013, 1020, cert. denied, 400 U. S. 902, 91 S.Ct. 138, 27 L.Ed.2d 138; 2 L. Frumer & M. Freedman, Products Liability § 19.07(1). This exception to the ancient principle that a party may not immunize himself from the consequences of his own negligence is predicated upon the consideration that businessmen can bargain over which party is to bear the risk of damage and set the price accordingly, thus achieving a more rational distribution of the risk than the law would otherwise allow. *See Delta Air Lines, Inc. v. McDonnell Douglas Corp.*, 5 Cir. 1975, 503 F.2d 239, 242–43, cert. denied, 1975, —— U.S. ——, 95 S.Ct. 1953, 44 L.Ed.2d 451; *Potomac Electric Power Co. v. Westinghouse Electric Corp.*, D.D.C.1974, 385 F.Supp. 572, 579; *Royal Indemnity Co. v. Westinghouse Electric Corp.*, S.D.N.Y.1974, 385 F.Supp. 520, 524–25. The rationale presupposes that the contracting parties have in fact considered the relative costs of insuring against negligent design and manufacture and have incorporated their conclusions into the contract. For this reason, although a seller's disclaimer of negligence will be enforced where the contract specifically mentions "negligence," "tort" or cognates thereof, *see, e. g., Delta Air Lines, Inc. v. McDonnell Douglas Corp., supra*, 503 F.2d at 242–43; *Philco Corp. v. "Automatic" Sprinkler Corp.*, 7 Cir. 1964, 337 F.2d 405, 407; *Potomac Electric Power Co. v. Westinghouse Electric Corp., supra*, 385 F.Supp. at 575–77; *Royal Indemnity Co. v. Westinghouse Electric Corp., supra*, 385 F.Supp. at 524–25; *Iowa Electric Light and Power Co. v. Allis-Chalmers Mfg. Co.*, S.D.Iowa 1973, 360 F.Supp. 25, 33, the courts will not enforce a disclaimer of negligent design and manufacture, even in a commercial context, unless the contractual language is clear and unequivocal.[7] *See, e. g., James F. O'Neil Co. v. U. S. Fidelity & Guaranty Co.*, 5 Cir. 1967, 381 F.2d 783, 786; *Sterner Aero AB v. Page Airmative, Inc., supra*, 499 F.2d at 714; *Keystone Aeronautics Corp. v. R. J. Enstrom Corp., supra*, 499 F.2d at 150; *Gimbel Brothers, Inc. v. William H. Vanderherschen, Inc.*, 3 Cir. 1972, 468 F.2d 597, 599; *Neville Chemical Corp. v. Union Carbide Corp., supra*, 422 F.2d at 1217–20; *L. Frumer & M. Freedman, supra*, § 19.07(1).

[9] We have been unable to discover any prior case involving a maritime tort claim based upon the negligent design and construction of a chattel where the buyer and seller thereof enjoyed relatively equal bargaining power and where the only damage was to the purchased article itself. We are thus faced with another choice of law problem, for although the terms of the warranty here were introduced as a defense to a maritime tort claim, contracts to build ships are not generally considered to be maritime in nature. *Kossick v. United Fruit Co.*, 1961, 365 U.S. 731, 735, 81 S.Ct. 886, 890, 6 L.Ed.2d 56, 60–61; *Hollister v. Luke Construction Co.*, 5 Cir. 1975, 517 F.2d 920, 921; *Richard Bertram & Co. v. Yacht Wanda*, 5 Cir. 1971, 447 F.2d 966, 967. In other words, there is some ques-

6. JIG III argues that the disclaimer of warranty is insufficient even as a contractual defense because the provision was inconspicuous and did not specifically disclaim the implied warranty of merchantability. In view of our disposition of this case, we need not resolve this issue.

7. The various jurisdictions are divided in their interpretations of the "clear and unequivocal" rule. Some states, such as New York, require explicit use of the words "negligence," "tort" or their cognates. *See Willard Van Dyke Productions, Inc. v. Eastman Kodak Co.*, 1963, 12 N.Y.2d 301, 239 N.Y.S.2d 337, 189 N.E.2d 693; *Boone Valley Cooperative Processing Assoc. v. French Oil Mill Machinery Co.*, N.D.Iowa 1974, 383 F.Supp. 606, 613–15; *Becker Pretzel Bakeries, Inc. v. Universal Oven Co.*, D.Md.1968, 279 F.Supp. 893, 900; *Pan American World Airways v. United Aircraft Corp.*, 1960, 3 Storey 7, 53 Del. 7, 163 A.2d 582. Other states, such as Illinois, require no specific wording but instead search the contract for a clear expression of the requisite mutual intent, giving a "fair and reasonable interpretation based upon a consideration of all of its language and provisions." *Tatar v. Maxon Construction Co.*, 1973, 54 Ill.2d 64, 67, 294 N.E.2d 272, 273–74. *See Rutter v. Arlington Park Jockey Club*, 7 Cir. 1975, 510 F.2d 1065, 1066–67; *Gates Rubber Co. v. USM Corp.*, 7 Cir. 1975, 508 F.2d 603, 617. Additional cases expounding the "clear and unequivocal" rule include: *Kansas City Power & Light Co. v. United Telephone Co.*, 10 Cir. 1972, 458 F.2d 177, 179; *Stromberg's v. Victor Gruen & Associates*, 10 Cir. 1967, 384 F.2d 163, 165; *National Motels, Inc. v. Howard Johnson, Inc.*, 4 Cir. 1967, 373 F.2d 375, 379–80; *United States v. Kelly*, 8 Cir. 1956, 236 F.2d 233, 237.

tion as to whether the general maritime law or Florida law should apply here, since Florida was the state in which the shipbuilding contract was made and performed. On the one hand, a concern for the uniformity of the law to be applied in the resolution of controversies founded on maritime torts militates in favor of construing this contract according to maritime principles. Furthermore, it might seem anomalous to hold that JIG III's case-in-chief must be interpreted according to general maritime principles, but that Atlantic Marine's defense is grounded in the law of Florida. On the other hand, since the contract was made and the PRINCESS built in Florida, it is certainly plausible to assume not only that Florida has a considerable interest in the resolution of this case, but also that the parties themselves expected that their contractual relations would be governed by Florida law. Fortunately, we need not decide this question, for we know that Florida requires clear and unequivocal disclaimers of liability for negligence in cases such as this one, *see Ivey Plants, Inc. v. FMC Corp.*, Fla.App.1973, 282 So.2d 205, 209; *cf. University Plaza Shopping Center v. Stewart*, Fla.1972, 272 So.2d 507, 511, and we are convinced that the general maritime law should not diverge from the general rule in this respect. *Cf. Dow Chemical Co. v. Dixie Carriers, Inc.*, 5 Cir. 1972, 463 F.2d 120, 121; *Jurisich v. United Gas Pipe Line Co.*, E.D.La.1972, 349 F.Supp. 1227, 1229.

[10] When we examine Atlantic Marine's warranty, we find that the shipbuilder made a six-month warranty "against defective workmanship and materials" under which JIG III's remedy was to be limited to the repair and replacement of defective parts and materials. The provision cautioned that "[n]o other warranty of any kind is made or implied, . . . including any losses of time or resultant damages sustained by the owner. . . ." Although Atlantic Marine contends that this language encompasses an adequate disclaimer of negligent design and construction, it is obvious that no specific mention is made either of "negligence" or of "tort liability." Atlantic Marine urges that the phrase "*defective* workmanship and materials" can mean nothing if not "*negligent* workmanship" and "*negligently* selected materials," and argues further that the disclaimer of liability for "losses of time or resultant damage" must also relate to potential losses from negligent design and construction. The problem with this argument is that it equates defects in the boat and losses resulting therefrom with tort liability, whereas it is perfectly possible that a design or part might somehow fail to comply with the agreed specifications and that such a failure could constitute a breach of contract without being tortious. The instant provision could certainly have been adopted with the intention of applying only to Atlantic Marine's potential contractual liability. *See Neville Chemical Co. v. Union Carbide Corp., supra*, 422 F.2d at 1220. Moreover, Atlantic Marine introduced no evidence at trial to show that the parties intended to alter the general rule of tort liability by allocating the risk of loss to JIG III in return for some diminution in the PRINCESS' price.[8]

8. The only evidence of intent on this point was the testimony of James I. George, Jr., who conducted JIG III's negotiations with Atlantic Marine. George stated that when he arrived at Atlantic Marine's shipyard to investigate the possibility of purchasing new boats for his fleet, the PRINCESS was already afloat and awaiting only the installation of her engines and navigational and fishing paraphernalia. As he was discussing the PRINCESS with Atlantic Marine's George Myers, Myers mentioned that the boat was equipped with a 4½-inch, cold-rolled steel shaft instead of the standard 4-inch, stainless steel variety. George had heard that cold-rolled steel was not as reliable a material as stainless steel, and so asked Myers whether Atlantic Marine's design was a safe one. Myers replied: "Jimmy, I don't think you will have any trouble because that's the reason we went from 4-inch to 4½-inch." This testimony certainly does not indicate that JIG III understood the risk involved in the PRINCESS' design and construction, or that JIG III agreed to assume that risk in return for a lower price.

In these circumstances, we do not believe that the purported language of disclaimer adequately supports Atlantic Marine's contentions as to the parties' contractual intent. Even assuming *arguendo* that the language of Article 7 is ambiguous, it is certainly not clear and unequivocal in its warning that JIG III thereby waived its common law right to recover any damages to the PRINCESS which might result from Atlantic Marine's negligence. We conclude that Atlantic Marine's contractual defense must fail.

We do not read the Uniform Commercial Code as a categorical imperative exiling or outlawing the law of negligence between contracting parties. While there may be no magic words which are necessary to grant absolution for negligence, we have in this contract no plausible syllabization for such grace. The warranty words call for replacement of parts and materials, which language is not consonant with damage resulting from faulty design because the warranty verbiage is piecemeal in nature, while the tort theory of liability may involve more comprehensive damage. Limiting contractual language and limitless liability predicated upon negligence can coexist in situations such as this one, and this duality can only be foresworn by language which will bear no interpretation other than that the seller shall not be held responsible for his own negligent wrongdoing. One can buy a pig in a poke, but only if the parties fashion their contract and compound their words with the pig's possible infirmities in mind.

Affirmed.

GEE, Circuit Judge (dissenting):

I respectfully dissent, thinking the opinion of the majority confounds the laws of torts and contracts and imports this tangle into the general maritime law. As I have always understood it, the law of torts in its most basic sense imposes general duties upon persons, regardless of their consent and without reference to their agreements. The law of contracts, on the other hand, concerns itself with the enforcement of promises made. Tort relationships between individuals in society are basically fixed, exist for reasons of public policy, and neither are nor should be readily modifiable by individual action. As to sales and purchases and absent government regulation, however, the law of contracts has always recognized that individuals are free to bargain for the quality of what they expect to get. Therefore the law of sales (the branch of contracts with which we are here concerned) does not impose on a seller a greater burden than that which he has agreed to undertake.[1]

1. Of course, not all of the details of each sales transaction are spelled out in a written or even an oral agreement. Rather, the parties are deemed to have contracted with the applicable commercial law in mind. Thus, many terms are now imposed, unless modified or disclaimed, by Article 2 of the Uniform Commercial Code (in 49 of the 50 states). It is important to note, however, that with certain limited exceptions virtually every term supplied by the

It is clear to me that an elaborate contractual relationship exists between JIG III, the purchaser/owner of the *Princess*, and Atlantic Marine, Inc., its manufacturer/seller. It is also obvious that the *Princess*, because of the defective design of her shaft, was not merchantable: she would not have passed without objection in the trade under the contract description as a shrimp boat and was not fit for the ordinary purposes for which shrimp boats are used. Uniform Commercial Code § 2-314(2)(a) and (c) (hereafter U.C.C. or the code). It follows that JIG III has a fine cause of action for breach of warranty under Florida law unless Atlantic Marine successfully disclaimed that implied warranty or unless JIG III failed to give notice of the defect.[2] *See* U.C.C. § 2-316, 2-607(3)(a). It is also possible, although it was not developed at trial, that JIG III could have an action for breach of an express warranty or of the implied warranty of fitness for a particular purpose, if applicable and undisclaimed. The damages available to JIG III would, of course, be those provided for by the code as conscionably limited by agreement of the parties. *See* U.C.C. §§ 2-714, 715, 719.

In short, taken together, the commercial law of Florida and the contract adequately define *all* promises, express and implied, and disclaimers of promises which these two economically-comparable parties made one another respecting the *Princess*, its *quality* as well as its specifications and, of course, its price. If promises are made and broken, the code, modified by the contract,[3] provides adequate remedy.[4] There is no occasion for resort to the law of torts for a right or a remedy. Moreover, allowing the plaintiff here, JIG III, to prosecute its tort cause of action is highly unfair to the defendant, Atlantic Marine, for it allows JIG III simply to ignore all of Atlantic's attempted disclaimers of warranty and limitations of remedies,[5] which disclaimers and limitations were a part of the bargain and are specifically allowed by the jurisdiction most concerned with the contract between these two parties (Florida). These issues have never been decided and now never will be. Yet surely the parties thought these clauses, here cavalierly brushed aside, meant *something*. It also dispenses JIG III from following those commercially reasonable practices, such as notice of breach, demanded by the code.

The majority, rather than looking to the commercial law of the State of Florida, has chosen to look to general maritime, tort law. In so doing it holds that

U.C.C. is modifiable by the parties. *See* U.C.C. § 1-102(3) and (4). Usually the implied detail is simply displaced if specific provision is made on its subject. Other implied terms, for instance the implied warranty of merchantability, must be specifically disclaimed in a fixed manner—but even these are subject to negotiation.

2. Breach and disclosure of warranty and notice were all issues in the district court. None, however, were submitted to the jury because the trial judge believed that if JIG could not prevail (on the facts) on its tort theories it would also lose on breach of warranty.

3. Or, more correctly, the contract supplemented by the code.

4. If, because of contractual modification of the code's damages sections, it seems that one or the other of the parties is without adequate remedy, it must be remembered that limitations are negotiated. It is possible, of course, that certain limitations could be commercially unreasonable, unconscionable, or could fail of their essential purpose. These can be ignored. U.C.C. §§ 2-718, 719.

5. The legal effect of the purported limitations and disclaimers was never passed upon below.

under the general maritime law a manufacturer/seller owes a purchaser with whom it is in a direct and elaborate contractual relationship regarding a product a free-floating duty[6] not to produce a negligently-constructed or designed product. The holding, I emphasize, is *not* that a duty is owed to avoid producing a negligently-designed product capable of causing *personal injury* or damage to property *other than to the product itself;*[7] rather it is that the manufacturer owes the purchaser (in direct contractual relationship) a duty to produce a product so negligence-free that it cannot harm itself.[8] Although there is, admittedly, some slender authority which supports this position,[9] there is equally per-

6. Duty is the *sine qua non* of tort liability. In considering whether such liability exists, one must examine what type of duty is owed (the scope) and *to whom*. The "to whom," it seems to me, is of utmost importance here. The situation would be entirely different if JIG III were not in contractual privity with Atlantic Marine. Even the Supreme Court of New Jersey, which has pushed tort recovery for property damage to its prior outer limit in *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), has recognized that privity is an important factor in the calculus. As a result, it has reserved the question of whether the rationale of *Santor* applies when a purchaser brings a strict liability tort suit against his seller for economic loss or for recovery of diminution in the basis of the bargain. *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412, 424, 426, 427 n. 16 (1973).

The majority's tautological observation that ". . . the common assumption is that parties intend their contractual relations to be governed by the law of contract, and their tortious relations, if any, to be governed by the law of torts; this is true even if the tortfeasor is a seller, the victim the buyer, and the only loss is property damage to a chattel purchased by the buyer from the seller", post at 7809, does little to explain from whence the tort duty arises in the wholly contractual relationship which it describes.

7. The *Princess* was doubtless potentially dangerous to its crew. However, they suffered no personal injury or property damage. Had the majority restricted Atlantic Marine's duty to that of producing a shrimp boat which was not dangerous to persons or external property the injury suffered here (the loss of the *Princess*) would not have been within the risk.

8. As I read the majority opinion, its logic, for instance, would allow the purchaser of negligently-mixed paint which peels to recover its price even though all warranties were conspicuously disclaimed.

9. The majority cites a number of cases, post at 7810, as supportive of its position. Of these, *Sterner Aero A. B. v. Page Airmotive, Inc.*, 499 F.2d 709 (10th Cir. 1974) is distinguishable. There the defective product was a replacement engine. The suit, however, sought recovery for damage to the body of the airplane which was clearly distinct from the new engine. The majority also asserts that its holding has been previously embraced a number of times by admiralty courts. However, of the cases cited, post at 7810-7811, only one, *Dudley v. Bayou Fabricators, Inc.*, 330 F.Supp. 788 (S.D.Ala.1971) is on point. In *Houston-New Orleans, Inc. v. Page Engineering Co.*, 353 F.Supp. 890 (E.D.La.1972) the defective product was a reinstalled electric control panel. Plaintiff sued for damages caused by the panel, not to it. It was a barge and a crane boom (neither of which was manufactured by Page) which were damaged. In neither *Sears, Roebuck & Co. v. American President Lines, Ltd.*, 345 F.Supp. 395 (N.D.Cal.1971) and *Taisho Fire & Marine v. Vessel Montana*, 335 F.Supp. 1238 (N.D.Cal.1971) was privity of contract present. In each the plaintiff sued the ship manufacturer/repairer for damage to cargo. Neither plaintiff was a shipowner. Also, obviously, neither suit involved an attempt to recover damages for injury to the defectively-designed ship. The remainder of the cases cited are personal injury suits.

Although Prosser and a number of other commentators state flatly that a seller's tort liability for negligent design includes property damage to the defective chattel itself, most of the cases cited in support of the rule involve situations in which an ultimate consumer has sued a manufacturer and privity of contract is absent. *See* W. Prosser, The Law of Torts § 101 at 665-66 (4th ed. 1971) and cases cited therein. *See* also dissent footnote 6 post at 7815-7816.

suasive (and in my opinion much better reasoned) authority to the contrary. *See, e. g., Hawkins Construction Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973). I would follow the logic of the latter and hold that no such tort duty exists in the general maritime law.

There are grey areas where doubt may exist whether the principles of the law of torts or the law of sales control a given case, but this is not one. Just as tort principles clearly control when a consumer, whether or not in privity with a seller or manufacturer, is injured by a negligently-manufactured consumer product, so our case appears to fit squarely within the territory clearly reserved for the law of sales. Here the purchaser/owner was in a direct contractual relationship with the seller/manufacturer. There is no personal injury, and the only damage to JIG III's property is to the hull of the *Princess* and the gear which had, at the time of the accident, become an integral part of the ship. When there is privity, no personal injury, and property damage only to the defective product itself, any remedies which a purchaser might have against his seller/manufacturer should be given by the laws of sales or the particular terms of the contract between the parties, not by the law of torts. The majority's contrary rule, which gives tort law preeminence, mangles the intricate mechanism of the U.C.C. and rewrites past contracts of maritime manufacturers such as Atlantic Marine entirely, changing the negotiated terms concerning the quality of the goods to be delivered. Quality, of course, directly affects price. Both quality and price should be negotiable items, and the law of sales is the framework within which the negotiations should take place—and did take place here. For these reasons I would hold that the general maritime law should not and does not recognize a tort-based, product-liability cause of action based either on negligence or strict manufacturer liability when there is privity and when the only loss suffered results from damage to the defective product itself. In holding that it does, we simply withdraw from the parties, and after the fact, a portion of the freedom to contract which the codifiers meant them to keep.

Fortunately, the rich new legal lode discovered by the majority, which has lain largely unnoticed under the noses of courts for time immemorial—that of tortious breach of contract—will likely remain largely unworked. In the normal contract case it does not signify whether the promisor carelessly but fortuitously

Professor Wade, whom the majority cites, is not entirely satisfied that such a tort duty exists presently.

> Between the situations involved in the last two paragraphs is one which is hard to classify. What happens when the product supplied by the defendant damages itself? Suppose the brakes in an automobile are defective; they fail and the automobile crashes and is destroyed. Suppose the electric wiring system in the car is defective; it develops a short and soon drains the battery so that it has to be replaced. Are these cases to be classified with the first paragraph above or with the second, or do they require a separate classification? One could say that tort recovery is not available whenever the damage is to the product itself. Or he could say that tort recovery is permissible whenever the harm to the product itself is of the "accident" type, as in the first illustration above. There is no clearly correct decision between the two positions. My personal inclination is toward the second one, but it is by no means a conviction.

J. Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the U.C.C. and Therefore Unconstitutional?*, 42 Tenn.L.R. 123, 129 (1974).

performs his promise or negligently fails to do so: the question is whether or not he performed it at all. And the alien duties from the world of torts which the majority materializes on JIG's side of the scales in our case may, they say, be disclaimed by contract—and doubtless promptly will be by knowledgeable shipbuilders operating within our reach.[10] And so we will return to the road which we should never have left, contract law, leaving as signs of our passage only a mulcted Atlantic Marine and a pitfall for the uninformed. I would reverse.

10. The court's opinion does stop short of imposing, in the name of public policy, an unwaivable minimum standard of quality, and so of price, in addition to the policy measures thought sufficient by those who drafted the basic U.C.C. and the legislatures which have enacted its various versions.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2709

D. C. Docket Nos. CA-72-B-121, CA-72-B-157 & CA-73-B-142

JIG THE THIRD CORPORATION,
Plaintiff-Appellee,
versus
PURITAN MARINE INSURANCE UNDERWRITERS CORPORATION, ET AL.,
Defendants-Third Party Plaintiffs-Appellees,
ATLANTIC MARINE, INC.,
Third Party-Defendant-Appellant.

****

JAMES I. GEORGE, JR., ET AL.,
Plaintiffs-Appellees,
versus
ATLANTIC MARINE, INC.,
Defendant-Appellant.

****

JIG THE THIRD CORPORATION, ET AL.,
Plaintiffs-Appellees,
versus
Y. E. HALL, INC.,
Defendant-Third Party Plaintiff-Appellee,
ATLANTIC MARINE, INC.,
Third Party Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

Before GOLDBERG, CLARK and GEE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that Atlantic Marine, Inc. pay to plaintiffs-appellees, and defendants-third party plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

September 15, 1975

GEE, Circuit Judge, dissenting.

Issued as Mandate:

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

October 20, 1975

TO ALL COUNSEL OF RECORD

No. 74-2709 - Jig The Third Corp. vs. Puritan Marine Ins. Underwriters Corp., et al.; Atlantic Marine, Inc.***George, et al. vs. Atlantic Marine, Inc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by Clare F Sachs
Deputy Clerk

cc: Mr. W. T. Womble
Mr. George D. Gabel, Jr.
Mr. Paul Q. O'Leary
Mr. Paul Y. Cunningham, Jr.

P.S. to Counsel: Judge Gee, Circuit Judge, dissents from the denial of rehearing for the reasons stated in his dissent from the panel opinion.

671.102 Purposes: rules of construction; variation by agreement.—

(1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this code are:

(a) To simplify, clarify and modernize the law governing commercial transactions;

(b) To permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) To make uniform the law among the various jurisdictions.

(3) The effect of provisions of this code may be varied by agreement, except as otherwise provided in this code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this code of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this code unless the context otherwise requires:

(a) Words in the singular number include the plural, and in the plural include the singular:

(b) Words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

History.— section 1, ch. 65-254.
Note.—Section 1-102, U.C.C.; supersedes Sections 678.33, 614.21.

672.314 Implied warranty: merchantability: usage of trade.—

(1) Unless excluded or modified (§672.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) Pass without objection in the trade under the contract description; and

(b) In the case of fungible goods, are of fair average quality within the description; and

(c) Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged, and labeled as the agreement may require; and

(f) Conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (§672.316) other implied warranties may arise from course of dealing or usage of trade.

History.—Section 1, ch. 65-254.
Note.—Section 2-314, U.C.C.

672.316 Exclusion or modification of warranties.—

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or

limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (§672.202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2):

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this chapter on liquidation

or limitation of damages and on contractual modification of remedy (§§672.718 and 672.719).

(5) The procurement, processing, storage, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them, into the human body for any purpose whatsoever is declared to be the rendering of a service by any person participating therein and does not constitute a sale, whether or not any consideration is given therefor, and the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of scientific procedures or techniques.

History.—Section 1, ch. 65-254; Section 1, h. 69-157.
Note.—Section 2-316, U.C.C.

672.607 Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.— . . .

(3) Where a tender has been accepted:

(a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

672.714 Buyer's damages for breach in regard to accepted goods.—

(1) Where the buyer has accepted goods and given notification (§672.607(3)) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

History.—Section 1, ch. 65-254.
Note.—Section 2-714, U.C.C.

672.715 Buyer's incidental and consequential damages.—

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include:

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

History.—Section 1, ch. 65-254.
Note.—Section 2-715, U.C.C.

672.719 Contractual modification or limitation of remedy.—

(1) Subject to the provisions of subsections (2) and (3)

of this section and of the preceding section on liquidation and limitation of damages:

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

History.—Section 1, ch. 65-254.
Note.—Section 2-719, U.C.C.